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VALIDITY OF RENT-FIXING STATUTES.

We have been asked to express some opinion on recent statutes which interfere with the landlord's right to fix rents and deprive him of his right of possession by taking away his common law action of ejectment and the summary statutory proceedings common to many states.

The mania for public regulation of private business, so prevalent in 1919 and the early part of 1920, was no doubt due to the desperation of the people, who found themselves threatened with extinction by what looked to them as the extortionate demands of those who controlled the necessities of life. Since deflation has begun and the extortioners are beginning to look for cover, it is likely that the public demand for rate fixing laws will diminish in the same ratio. An indication of this change of sentiment is already apparent in the action of the House in repealing the Lever Food Control Act over the constitutionality and construction of which a sharp legal controversy has been raging for many months.

Rate fixing, even if constitutional when applied to matters in which the public have not a direct interest, are of doubtful expediency. Our Public Service Commissions are centers of continual controversy with the public as well as with the utility companies. Recent decisions of such commissions authorizing increases of public service rates above these set by contracts between such companies and the municipalities which bestowed the franchises are convincing the people that they fared better without regulation than with it; for under regulation the companies have no incentive to keep down expenses and simply pile the burden of their extravagance and the higher wage demands of their employes upon the people.

We are not attacking the Public Service Commissions. We believe that in many respects they are serving a useful purpose, but their unscientific and hap-hazard methods of fixing rates are not such as to encourage the people to multiply experiments of this kind until those already under way have proven more acceptable. And of all such experiments that which attempts to fix rents and gives to tenants after the termination of their leases the right of continued possession without the landlord's consent is the most unreasonable and ridiculous. We make this statement only on the assumption that property has not yet been nationalized by the adoption of the principles of Socialism. If all property belongs to the state, the state may properly fix the price and transfer its possession to whomsoever it pleases, but if the individualistic theory of property rights is still recognized and if these rights are still protected by the Constitution and may not be taken away without due process of law and, if taken for a public use, must be paid for, we do not see on what plausible ground the owner of a house can be singled out and told to rent his house at pre-war rates while the shoe merchant is allowed to demand fifteen dollars for five-dollar shoes. To require a landlord to rent his property at a loss or even at a net profit which in view of the decline in the value of money is virtually a loss is unfair discrimination against the property owner and deprives him of his property without due process of law.

The rent fixing statutes in the different states, as a rule, follow the provisions of Ball Rent Law passed by Congress for the District of Columbia. This Act first declares rental property, hotels and apartments "affected with a public interest, and that all rents . . . shall be fair and reasonable; and any unreasonable or unfair provision of a lease . . . is hereby declared to be contrary to public policy."

It provides for a rent commission which, on complaint of either the landlord or ten-

ant, or on its own motion, is empowered to inquire into and determine whether the terms and conditions of any lease are fair and reasonable. On hearing, if the commission finds that the rent or terms of the lease are unreasonable or unfair, it shall determine and fix a "fair and reasonable rent or charges therefor, and fair and reasonable service, terms, and conditions of use or occupancy."

The Act further provides that a tenant after the expiration of his lease may continue in possession at his option and against the will of the landlord being liable to pay the amount fixed by his former contract or an amount decided reasonable by the commission. The only exception to this rule is that the landlord, on giving thirty days notice, can secure possession of the property for his own use and occupancy.

The Ball Rent Law was declared unconstitutional (June 2, 1920) by the Court of Appeals of the District of Columbia in the case of Hirsh v. Block, 267 Fed. 614.

In this case an owner of property sued for possession of property after termination of the lease without giving thirty days' notice as provided by the Act. The owner contended that the Act was unconstitutional. In reversing a judgment for the defendant, the Court said:

"The act gives defendant the option of retaining possession of the property at the rental fixed in the lease, which is continued in force; or, if dissatisfied, he may apply to the commission for a reduction of the rent. If reduced by the commission, plaintiff is powerless to have a review of the facts upon which the action of the commission is based. Not only is plaintiff denied any remedy for this continued detention of his property, but he is forbidden to sell his property except subject to and burdened by the option of the tenant. It would seem, therefore, that if the property clauses of the Constitution are longer to have any restraining power over Congress, the case here presented is one within the inhibition of the Fifth Amendment."

The astonishing provisions of this Rent Law are duplicated nowhere else to our knowledge. Even where public property is sought to be applied to a public use it has never been held that this use can be for the peculiar benefit of a single individual. The Massachusetts Supreme Court declared that the people of that state could not be taxed to build homes for the residents of a town wholly destroyed by fire. 111 Mass. 454. And Justice Story speaking for the Court in Wilkinson v. Leland, 2 Pet. 627, 658, said:

"We know of no case, in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power, in any State in the Union. On the contrary, it has been consistently resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."

The celebrated case of Munn v. Illinois, 94 U. S. 113, the last refuge of men who seek to apply another's property to their own use, does not justify the transference of A's property to B as this statute does when it permits B, the tenant, to hold over after the termination of his tenancy without a renewal of his contract and against the landlord's consent. Even if it be contended that renting property is a business affected with a public interest and that therefore the legislature may fix the rental value, yet the right of possession is not and cannot be interfered with by the legislature except under its power of eminent domain or its war powers and then only to serve a public purpose and not the interests of particular individuals.

We are free to confess that in view of recent liberal decisions of the Supreme Court, the exact limitations on the power of Congress or a state legislature to declare any man's property affected with a public interest are very shadowy. Budd. v. New York, 143 U. S. 517; Brass v. Stoeser, 153 U. S. 391; Noble State Bank v. Haskell, 219 U. S. 104; German Alliance Insurance

Company v. Kansas, 223 U. S. 389. In the last case cited the Court held the business of insurance to be affected with a public interest and sustained an act of the Kansas legislature fixing the premiums to be charged for insurance. In this case the Court refused to apply the "monopoly" test which had hitherto been set up by the courts as justifying the application of the rule set up in Munn v. Illinois and refused to set any limitations to the rule. The Court also ignored the earlier decisions of the Court that a legislature could not regulate the prices of services purely personal and private in their nature and that the test of whether a business is public or private is whether the public have a right to demand service and therefore possess the correlative right to regulate rates and charges. The result is that there are no definite boundaries on the power of rate regulation and it seems that doctors' bills, theater tickets, garage rentals, lawyers' fees, hotel charges and any other charge of any kind may be fixed by separate commissions created by the legislature on their mere finding that the particular business is affected with a public interest. The full extent of the rule as it exists today is clearly stated by the Supreme Court in the following extract from its opinion in the German Alliance Insurance Company case, to-wit:

"The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in People v. Budd (117 N. Y., 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. 'The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.'"

Assuming, however, that the business of renting property can be regulated and future rentals fixed, it is not possible for the legislature to take away from the courts the power to determine the fairness of rates so fixed as the Ball Rent Law does when it provides that the findings of the Rent Commission as to the reasonableness of the rents fixed shall be conclusive and "shall not be modified or set aside by the court except for error of law." In the first place so far as the Ball law is concerned Congress has no power, under the Constitution, to confer judicial and legislative power on the same body. To determine the reasonableness of an existing rate is judicial; to determine the reasonableness of a future rate is legislative. So far as Congress is concerned these two powers cannot be united. Moreover, the question of the reasonableness of an existing rate is a question of fact and no person can be denied access to the courts of the state for the purpose of determining the question whether under the guise of regulation, the state is in fact confiscating his property.

Moreover, the provision in the Ball law and other rent laws that a tenant may hold over after the termination of the lease is without justification or analogy in any other law. Even when the legislature gives power to a commission to fix rates, there has never been implied a power on the part of the Commission to permit the property subject to regulation, itself to be seized and given to another. The right of a state to take another's property must be done under the police power or the power of eminent domain and not under the power to fix rates. The state may seize my property for a hospital under a public emergency, but it cannot take my home and give it to another simply to serve that other person's convenience. The public health or safety is not served by such a transaction. Under the Ball Act the landlord does not even enjoy the privilege the Supreme Court held that every bank in Oklahoma enjoyed under the Guaranty law of "going out of the bank-

ing business." Noble Bank Case, 219 U. S. 575). Under this Act he must continue in the business even after the termination of his contract relations and be subjected against his will to the obligations, annoyances and losses which may follow.

New York has a rent statute which went into effect in September, 1920. It is creating much litigation and raising many new questions. This law takes away the landlord's remedies for possession except in four cases, (a) where holdover is objectionable; (b) where landlord desires to occupy the premises himself; (c) where landlord intends to demolish the structure; (d) where premises are sold to a co-operative corporation. In all other cases the tenant is permitted to hold over beyond his term and upon tendering the landlord the old rental or depositing the amount in court may continue in possession until the Court determines whether the new rent demanded is reasonable. The question of the constitutionality of the New York law has not been passed upon by any of the higher courts of that state but in a nisi prius decision by Wagner J. in Ullmann Realty Co. v. Tamur (Nov. 27, 1920), the Act was sustained on the ground that it is only for two years and applicable only to cities of the first class, and is to be regarded as an emergency measure to avert a menace threatening the large cities of the state by reason of the fact that in October, 1920, wholesale evictions were overhanging thousands of tenants in the big cities; exorbitant and extortionate demands for rent had been met with the impossibility of compliance; the consequent congestion which these conditions led to became perilous to public health, safety and morals.

In justifying this legislation in view of these special conditions the Court said:

"The necessity of the remedy being apparent it remains to consider whether the Legislature was invested with the constitutional power which it has exercised. Ultimately the inquiry confronting us narrows down to the proposition whether in a time of public emergency affecting the homes and shelter of the people, endangering their health and safety, the result of an upheaval of the conditions following a world war, there exists such power and authority in governmental function as to provide that the people in the face of oppressive demands should not be summarily evicted and ejected from their homes and unprovided with shelter during the continuance of the emergency, when at all times willing, and, in fact, offer to pay for the use of the premises occupied by them a reasonable rental value, and wherein they should be permitted to interpose in proceedings brought the defense that the rent sued for is unjust, unreasonable in amount and oppressive in character."

If such an emergency existed in New York as this quotation would imply, there can be no doubt that the public health and safety were at least temporarily endangered and if the situation had not been met in this unusual manner it would probably have been met by an appropriation for tents and temporary structures to house those who could find no place to reside. To require the landlords to turn over property to their hold-over tenants who had no more right to them than any other stranger and at a rental far below the market value, seems to us like putting the whole burden of taking care of this public emergency upon the property owners, instead of upon the community. The landlords in asking the market value for their property were doing no more than their union labor tenants in asking the market value for their labor or the butcher in asking seventy-five cents a pound for round steaks.

It seems to us that, even admitting a public emergency existed the legislature has no constitutional power to impose on one class in the community the burden of caring for a situation which the whole community should share equally.

NOTES OF IMPORTANT DECISIONS.

SOME RECENT INCOME TAX DECISIONS OF THE TREASURY DEPARTMENT.

Office Decision 644. Sale of Interests in Mineral Rights.—"Land was purchased in 1914. At the time of the purchase the mineral rights in the land had no market value, that is, no part of the purchase price of the land was paid as consideration for the mineral rights therein. Subsequently the land was leased on a royalty basis for oil and gas development, and in 1919 amounts were received from the sale of interests in such royalty."

"Held, that inasmuch as the oil and gas rights had no market value at the time the land was purchased, the entire amount received from the sale of the royalty interests is income for the year of its receipt, subject, however, to proper adjustment on account of depletion sustained."

Office Decision 668. Sale of Good Will.—"Where a corporation sells its assets, including good will, to a competing corporation, one condition to the sale being an agreement by the president of the vendor corporation not to engage in similar business, for which he is paid a money consideration, the amount so received by the president does not represent a conversion of capital, but is income for the year of its receipt."

Office Decision 672. Returns at Dissolution of Corporation.—"Under the law of the State of Illinois, a corporation cannot be dissolved until a formal showing is made that all its liabilities have been satisfied. Under income tax regulations a corporation going into liquidation is permitted to file its return for the fractional part of the year during which it was engaged in business only upon completion of such liquidation."

"Held, under the circumstances, that the Bureau will waive the filing of evidence of the completion of liquidation, and will accept a final return from the corporation, if accompanied by a certificate of the court showing that all requirements of the law with regard to dissolution of the corporation and distribution of its assets have been satisfied, except as to evidence of payment of federal income taxes, and that actual winding up of the corporation merely awaits formal Court action. Upon payment of all federal income tax shown to be due from the corporation, the collector will issue the necessary receipt."

Office Decision 659, Corporation Insurance.—"Where a corporation insures the life of its president, the stockholders being beneficiaries in proportion to their stockholdings and the wife of the president (not being herself a stockholder) being a beneficiary in proportion to her husband's stockholdings, no deduction for the payment of premiums can be allowed under Article 294 of Regulations 45, as amended by T. D. 3019, since the corporation itself is indirectly a beneficiary under the policy."

"The premiums paid on such a policy are a charge against surplus and represent dividends to the stockholders, subject to surtax to the extent that such premiums are paid out of earnings or surplus accumulated since February 28, 1913. This applies as well to the officer upon whose life the insurance is carried."

Office Decision 645, Use and Occupancy Insurance Received Considered Income.—"The M Company in 1919 had a fire in its plant which necessitated shutting down for a day. The company has recovered under a use and occupancy policy of insurance the sum of x dollars as compensation for the loss of use of its factory."

"Held, that sums recovered under such a policy are nothing more than compensation for the loss of anticipated profits, and whether such sums are less than, equal to, or in excess of such anticipated profits for the period of nonuse, they, nevertheless, represent income within the meaning of that term as used in the Revenue Act of 1918."

"The amount of premiums paid on insurance of this character is properly deductible as a business expense."

Office Decision 647, Interest on State Obligations.—"Profit derived from non-interest-bearing state and municipal securities purchased at a discount and held until maturity is not taxable where it clearly appears that the return from the investment in the hands of the taxpayer is due solely to the compensation received from the state or municipality in lieu of interest for the use of the taxpayer's money. In no case may such exemption exceed the total discount at which the securities were originally sold by the state or municipality."

Office Decision 664, Bonus for Prompt Delivery Considered Expense.—"A bonus was paid for the delivery of a steamship at a date earlier than that stipulated in the contract for its construction, and the question is presented whether the amount is properly chargeable as a business expense or as a capital expenditure."

"Held, that as the bonus paid for delivery at a date earlier than that contracted for added nothing to the value of the vessel after the contract date of delivery, the amount so paid is

properly chargeable as a business expense and is deductible from income received between the date of delivery of the vessel and the date it would have been delivered had no bonus been paid."

***Office Decision 665, Personal Exemptions of Head of Family.*—"A daughter who actually supports and maintains her dependent mother elsewhere than in her own home, by reason of the fact that she is unable to earn enough to support them both in the mother's place of abode or to defray their joint expenses in the daughter's place of employment is properly classifiable for income tax purposes as the head of a family."**

THE DOMICILE OF SEPARATED SPOUSES.

The question argued in the recent House of Lords case[1] was whether a wife could, notwithstanding the marriage, acquire a domicile independent from that of the husband. In this case the husband, whose domicile of origin was Scotland, acquired a domicile in Queensland. He contracted, it was alleged, a bigamous marriage there. The wife remained in Scotland till her death. She had raised an action of divorce for adultery and desertion, but died before the summons was served. The argument put forward was that in these circumstances she could and did acquire an independent domicile in Scotland, where she died, and that consequently the right to succeed to her movable estate and the liability to legacy duty depended on the law, not of Queensland, but of Scotland.

In support of this contention the appellants relied on a certain dictum of Lord Cranworth in the case of Dolphin v. Robins.[2] In that case, Mrs. Dolphin, the wife of a domiciled Englishman, had obtained a decree of divorce in the Scottish courts on the ground of adultery against her husband, who at that time was temporarily resident in Scotland. She had then gone to France, where she had gone through the ceremony of marriage with a Frenchman. The question in the case was whether Mrs. Dolphin, on her death, was by domicile an Englishwoman or a French woman. This House first decided that the Scottish decree of divorce was null for want of jurisdiction, no court having power to divorce *a vinculo* except the court of the country of the domiciled husband—and then put the question for argument "whether the circumstances are such as to render the wife capable of gaining for herself a domicile, and if so, did she do it?" The learned Lords unanimously held that the null decree of divorce being in no sense equivalent to a decree of separation, Mrs. Dolphin remained a married woman not separated from her husband by judicial decree, and therefore incapable of acquiring a different domicile from that of her husband.

Lord Cranworth, in that case, indicated a doubt as to whether, if there had been a decree of judicial separation, the wife might not have acquired a domicile different from that of her husband, and, having almost expressed his preference for the view that she might, he proceeds as follows: "On this question it is unnecessary and it would be improper to pronounce an opinion, for here there was no judicial sentence of divorce *a mensa et thoro* no decree enabling the wife to quit her husband's home and live separate from him. I have adverted to the point only for the purpose of pointing out that the conclusion at which I have arrived in the case now under discussion would afford no precedent in the case of a wife judicially separated from her husband. For, whatever might have been the case if such a decree had been pronounced, I am clearly of opinion that without such a decree it must be considered that the marital rights remain unimpaired."

He then went on to say, and it was on these words that the appellants in MacKin-

(1) McKinnon's Trustees v. Lord Advocate, 1920, 2 S. L. T. 240.

(2) 1859, 7 H. L. C. 390.

non's Trustees v. The Lord Advocate founded: "Before quitting the subject I should add that there may be exceptional cases to which, even without judicial separation, the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife and established himself permanently in a foreign country, or has committed felony and been transported."

In regard to the application of these dicta to MacKinnon's case, Lord Shaw said: "Any doubts that there are in the case have arisen in the legal sphere, but even there they have not arisen on account of the application of any well-known doctrines in law, but substantially upon a conjecture by way of reserve, for I call it so—a conjecture by way of reserve expressed by Lord Cranworth in the case of Dolphin v. Robins. That conjecture has been repeated and repeated in text-books and succeeding cases. No case which crystallizes it in fact has ever yet arisen in which any exception to or aversion from the general doctrine of domicile has been given effect to. I am clearly of opinion that the present case is certainly not one to which any such conjectural exception could apply." The other judges were unanimously of the same opinion.

The following concluding observations by Lord Shaw should be noted, as they are bound to become of practical interest sooner or later: "It appears to me, my lords, to be a question which has certainly never been settled in the affirmative whether even a judicial decree of separation can affect the domicile of the spouses permitting thereafter separate domiciles to be acquired. The ordinary rule has not yet been so invaded. It works conveniently. It prevents confusion. It regulates succession by one set of rules instead of possibly by two, and it preserves that unity of idea and fact with regard to the domicile of married parties which has hitherto always been upheld by law.

"I should desire further to observe that I should have the greatest doubt in any event whether, if one of the spouses fails during the continuance of the marriage to obtain a divorce *a vinculo matrimonii*, it is legitimate to raise the question after the death of the other. *A fortiori*, I think this is to be also the case when the question is raised after the death of the spouse, as in the present case, in order to promote or regulate ulterior interests."

It is of interest to note that little if any appeal was made in argument to the theory of "the matrimonial domicile," which may now be taken as extinct. In the leading case of Le Mesurier (1895), A. C. 531), Lord Watson quoted with manifest approval the judgment of Lord Deas in the Scotch case of Jack v. Jack,[3] where that distinguished judge characteristically said: "Neither can I solve this case by what has been sometimes called the domicile of marriage. The phraseology appears to me to be calculated to mislead. It is figurative and wants judicial precision. There is no third domicile involved apart from the domicile of the husband and the domicile of the wife. Domicile belongs exclusively to persons. Having ascertained the domicile of the husband and the domicile of the wife, the inquiry into domicile is exhausted." After an exhaustive summary of the cases both in England and in Scotland, Lord Watson in Le Mesurier concluded: "When carefully examined, neither the English nor the Scottish decisions are, in their lordships' opinion, sufficient to establish the proposition that in either of these countries there exists a recognized rule of general law to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage."

DONALD MACKAY.

Glasgow, Scotland.

(3) 1862, 24 D. 467.

FROM BLUE LAWS TO BLUE SKY LAWS—THE PILGRIM TERCENTENARY.

Recently I received two publications in the same mail, one entitled, "Liberty," the other, a monthly review of financial conditions issued by the National City Bank of New York. The first pamphlet was a reminder that on December 21, 1920, would occur the tercentenary of the Pilgrim's landing at Plymouth Rock, and incidentally, that they proposed that each member of the colony should worship God according to his own conscience and compel everybody else to do the same. To that end many rigid laws were enacted by the New England pioneers for the proper worship of the established religion. These enactments have become known as "The Blue Laws." Many reasons have been given why these laws were designated "blue," but the humorist who said they were called "Blue Laws" because their rigid, fanatical enforcement made the people feel "blue" is about as correct as any.

In glancing over the other periodical, sponsored by the greatest bank in the world, I observed a lengthy discussion of the necessity for "Blue Sky Laws." Naturally the title to this article suggested itself, which projects into view the changes in this country's laws for three hundred years.

Since the landing of the Pilgrims a great nation has evolved with more than a hundred million people, holding sway from the frozen North to the Gulf of Mexico, and from ocean to ocean, exercising dominion over the islands of the sea. Then legislators concerned themselves with matters of conscience and the established religion, while now law-makers are busy in solving economic and social problems and in regulating affairs of business. Our Constitution wisely provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof."

The progress made in three centuries in the arts and sciences has surpassed the most extravagant speculations of a Jules Verne. In the acquisition of wealth, in the extraordinary volume of commerce and in the vast daily financial transactions this nation has so far surpassed all the ancient empires and republics that there is no basis for comparison.

However, there existed the Puritan "Blue Laws," in "ye olden time," which are now regarded as a curiosity in misguided legislation. For instance, whoever did profane the Lord's Day by doing unnecessary work or traveling or by sporting was to be fined forty shillings or publicly whipped, but if the offender did violate the law "proudly and presumptuously" he was to be put to death or grievously punished at the judgment of the court. As witchcraft was believed in by learned men—Cotton Mather, Sir Edward Hale then Lord Chief Justice of England, and many others—it was provided: "If any man or woman be a witch, or consulteth with a familiar spirit they shall be put to death." The Salem witchcraft persecutions were based on this statute. Nor were the accusations confined to people of little influence, for in 1656 Ann Hibbins, sister of Governor Bellingham of Massachusetts, was convicted by a jury of witchcraft and hanged. These freak laws were enacted by the Plymouth Colony and in Connecticut beginning with 1636.

Charity seems to have been wholly lacking towards dissenters and Quakers. It was enjoined that "no food or lodging shall be afforded to a Quaker, Adamite or other heretic." Again, "if any person turns Quaker, he shall be banished and not suffered to return, upon pain of death." Apparently love and affection were condemned by their laws, for "no woman shall kiss her child on the Sabbath day," and the same applied to husband and wife. Gathering sticks on the Sabbath when unnecessary was punished by death, but if gathered privily or in need, a lesser punishment might be administered by whipping the

offender. This followed the Mosaic Law literally, thus: "Whosoever doeth any work in the Sabbath day, he shall surely be put to death."[1]

The Colonists founded a theocratic government, and, therefore, blasphemy, that is, the denial of the Holy Trinity, was punished like seditious utterances in a secular state. Consequently, whoever was found guilty of blasphemy the third time was put to death "so that he might find out the truth of certain matters to his own satisfaction."

It may be said in extenuation that these Blue Laws were not always literally enforced; the same may be said of many absurd present-day laws. Yet, it is recorded that in 1692 nineteen were hanged for witchcraft, and others tortured to death. Among them was the Rev. George Burroughs, a pious clergyman of excellent attainments.[2]

Three centuries have elapsed since the Pilgrims landed. One would suppose that the futility to enforce laws compelling religious worship had been fully demonstrated. It is a fact, however, that Blue Laws exist today. It is current news that in Virginia a deputy sheriff was convicted of shooting Roland Parks, while sitting in his own house on Tangier Island, because Parks failed to attend church as required by a local ordinance. Recently the Seattle press contained this statement: "On complaint of the president of the W. C. T. U. the prohibition director of the State of Washington has issued orders for the seizure of twenty gallons of homemade blackberry wine at the home for aged and indigent widows of Civil War Veterans, maintained by the ladies of the G. A. R. and other patriotic organizations," which reminds one of King Lear:

"Through tattered clothes small vices do appear;
Robes and furr'd gowns hide all. Plate sin with gold,
And the strong lance of justice hurtling breaks;
Arm it in rags, a pigmy's straw doth pierce it."

According to the daily press a new set of Blue Laws are to be urged upon Congress by the Lord's Day Alliance. It is proposed to prohibit all work and activity in the postal department and interstate commerce on Sunday. The climax of absurdity is reached in providing that "any corporation that does, or aids in doing, these forbidden things shall be fined not less than $1,000 nor more than $100,000 for each offense, and for a second conviction shall forfeit its charter and franchise and shall be enjoined from operating in interstate commerce." If this should become the law, Torquemada, the first and vilest inquisitor-general of Spain, may yet be outdone.

Taking a retrospective view of three centuries, it is apparent that wonderful progress has been made, even in the most laggard and conservative of all sciences—the law. The Declaration of Independence and the Constitution are shining milestones along the pathway of enlightenment and humanitarianism. In spite of constitutions and liberalizing tendencies for centuries, we yet have Blue Laws of some kind. The enforcement of the Eighteenth Amendment is a reminder of Blue Law methods. Homes have been ransacked, property destroyed, and even human life sacrificed in an effort to locate a bottle of "booze." No doubt the purpose of this amendment is laudable and for the best interest of the nation: it is the arbitrary enforcement and disregard of personal rights that is deplorable. This, of course is justified by saying, "The end sanctifies the means," after the manner of the Puritans.

The same spirit has pervaded some of the courts in relation to the espionage laws. For instance, Pastor Russell published a religious book called" The Finished Mystery," which did not approve of war. After his death, a Mr. Rutherford and others circulated this book for sectarian propaganda.

(1) Exodus 31:15.
(2) The Witch Case, 1 Am. St. Trials, 530.

They were indicted, convicted and eight of them sentenced to imprisonment for twenty years at hard labor. The Circuit Court of Appeals reversed this judgment because of arbitrary rulings and evident bias of the trial judge, and the grossly excessive sentences.[3] This case is remarkable, in that the Hon. Harland B. Howe, U. S. District Judge for Vermont, while presiding in New York City, directed that one W. F. Hudgings, a witness for the government, be imprisoned for contempt of court, because he "wilfully refused to answer questions truthfully;" and to remain in jail until he should testify to the truth. The witness was at once indicted for perjury, gave bail, and an order was issued for his release, which was held inoperative, when it was shown that he was committed for contempt. Accordingly, Hodgings was in prison from June 11, 1918, until April 14, 1919, when he was released on writ of habeas corpus from the U. S. Supreme Court.[4] There it was decided that a witness could not be punished for contempt because the judge believed the witness testified falsely, unless there existed "the further element of obstruction to the court in the performance of its duty."

Chief Justice White commented on this proceeding as follows: "If the trial judge was right, it would follow that when a court entertained the opinion that a witness was testifying untruthfully, the power would result to impose punishment for contempt, with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that potentiality of oppression and wrong would result, and the freedom of the citizen, when called as a witness in a court, would be gravely imperilled."

There are many other official acts that savor of blue law theories. The recent expulsion of socialist members from the New York legislature was a reprehensible performance. The ballot has been proclaimed as a panacea for all political ills and is an approved means to remedy any real or fancied wrongs in our body politic, and to effect changes in our Constitution and laws. By excluding these socialists, duly elected, because of political affiliations, a pernicious precedent has been established.

Taking another look backward it will be observed since the Pilgrims landed, that there has been a remarkable change in the attitude of government towards the people. Then the authorities were limited to tax and revenue collecting, to police duty, to administering justice, and to the defense of the realm. There were no postoffices, no common schools, no public roads, no public utilities and no paternalistic functions performed by the State. It was a maxim that a state was governed best that was governed least. The doctrine of laissez-faire held full sway.

Today the government regulates freight and passenger rates, engages in workingmen's insurance, guarantees bank deposits, and numerous other affairs that were considered strictly private only a few years ago. The highest court in the land sanctions any scheme the people want to try; as in North Dakota, to tax the public for operating mills, banks, elevators or anything else; in fact the limit has been taken off when it comes to use public funds for utopian schemes. Green v. Frazier, decided by the U. S. Supreme Court, June 1, 1920, upholds North Dakota laws. In line with these state activities, pro bono publico, is the legislation known by the poetic name of "Blue Sky Laws," which prohibits the sale of stocks and securities of corporations, unless approved by the authorities. How and why this name was adopted appears to be uncertain, but it is claimed that promoters would capitalize anything even the blue sky, for the purpose of selling stock, as was customary when British financiers offered shares in The Vulture Insurance Company

(3) Rutheford v. U. S., 258 Fed. 855.
(4) Ex parte Hudgings, 249 U. S. 378; 63 Law. Ed. 656.

and The Artificial Rain Co., promoted by Sir Sharper Bubble.[5]

These laws, however, are endorsed by the National City Bank and properly so. In its pamphlet for October, 1920, p. 10, it gives an illustration of modern "wildcatting" called promoting, by citing the case of the Midland Packing Co. of Sioux City, Ia., now in custodia legis, thus:

Promoting expenses	$2,561,814.00
Packing Plant	3,138,897.00
Note discounts	362,000.00
Salaries	117,035.00
Organization expenses	23,000.00
Traveling and entertaining	11,787.00
Office expenses	38,000.00
Total	$6,272,533.00

A Minnesota corporation, the Pan Motor Co., sold stock to 54,000 persons, receiving $4,723,811, but $1,200,000 was paid to agents; $650,000 the promoters kept, and $500,000 went for advertising. Thus half the money obtained was dissipated. No wonder the Nebraska Bankers' Association disapproved of buying notes given for promotion stocks and securities. In face of these facts a Blue Sky Law is a necessity for the protection of the public. The ordinary investor has no means of knowing the truth about corporation stocks offered for sale. A state has not only the power but can provide facilities for obtaining accurate information for public use. The state laws on this subject were violently attacked upon three grounds: 1. That citizens were deprived of their property without due process of law, and denied the equal protection of the law. 2. That the statute violated the right of contract and impaired the obligation of contracts. 3. That it interfered with interstate commerce. One of the first cases is Ex parte Taylor,[6] where the entire act is set forth and sustained. The Federal district courts were inclined to hold these statutes void because in conflict with the contract and commerce clauses of the Constitution. Cases were appealed from the federal courts of Ohio, South Dakota and Michigan. Every conceivable point was raised. Each of the cases was reversed. That constitution paralyzer, alias the police power, came to the rescue of the Blue Sky Law, gave it life and permanent vitality. The constitutionality of such laws was fully established by the U. S. Supreme Court in January, 1917.[7] Justice McReynolds alone dissented in each case without giving any reason.

In the State of Washington there is no law regulating the sale of corporate stocks or securities; no doubt the next legislature will pass such an act. Corporations organized for proper purpose and honestly conducted will be greatly benefited by such law; bogus concerns should not be tolerated, nor have the right to sell shares of stock.

A bird's-eye view of jurisprudence for three hundred years presents a marvelous expansion: laws pertaining to private and public corporations, trusts and receivers, master and servant; life, fire, accident and fidelity insurance; assumed risk and fellow-servant doctrine and many other important subjects were then practically unknown. In 1800 there were not to exceed one hundred business corporations in the United States. In 1918 there were over 380,000 of such corporations doing a gross business of eighty billion dollars.[8]

As in days of yore, criticism is often heard of the law, lawyers and courts, as well as of our political, business and social insti-

(5) Ten Thousand a Year, Book 4.
(6) 68 Fla. 61, 66 So. 292.
(7) Hall v. Geiger-Jones Co., 242 U. S. 539, 61 Law. Ed. 480; Caldwell v. Sioux Falls Stock Yards Co., 242 U. S. 559, 61 Law. Ed. 493; Merrick v. Halsey & Co., 242 U. S. 568, 61 Law. Ed. 498.
(8) Thompson on Business Trusts, p. 5.

tutions. Some of it may be well founded, for we have not yet entered upon the millennium of perfection. Nevertheless, the truth is that the status of the people has been immeasurably advanced; there is greater opportunity for education, for travel and enjoyment; a better chance for success in commerce, in the trades, in agriculture and all lines of work and affairs and business than ever before. The portals are wide open to any one possessing ability and a willingness to work, and who is ambitious—to grasp the opportunity for advancement to respectability, affluence and independence. As compared with what the Pilgrims had we are living in an age of extravangance and in our daily life are supplied with luxuries never dreamed of by a Croesus. However, "Mankind never is, but always to be, blessed;" therein lies the mainspring of progress.

On December 22, 1820, Daniel Webster delivered his magnificent Plymouth oration, forecasting the immense expansion of our nation to the west, and anticipating our views of the people and events of his day, thus: "They are in the distant regions of futurity, they exist only in the all-creating power of God, who shall stand here a hundred years hence, to trace through us, their descent from the Pilgrims, and to survey, as we have now surveyed, the progress of their country, during the lapse of a century. We would anticipate and partake of the pleasure with which they will then recount the steps of New England's advancement. On the morning of that day although it will not disturb us in our repose, the voice of acclamation and gratitude, commencing on the Rock of Plymouth, shall be transmitted through millions of the Sons of the Pilgrims, till it loses itself in the murmurs of the Pacific seas."

FRED H. PETERSON.

Seattle, Wash.

HIGHWAYS—LIABILITY OF PAVING CONTRACTOR.

METCALF v. MELLEN et al.

Supreme Court of Utah. Sept. 10, 1920.

192 Pac. 676.

A paving contractor, who agreed with the highway commission that he would guard unsafe places near the work and do all other things necessary to prevent accidents, is liable in tort to an automobile driver, whose machine was damaged because of the paving contractor's breach of his contract in that respect.

WEBER, J. Plaintiff brought suit against defendants to recover damages to his automobile and to those of three others whose causes of action were assigned to him. The court granted a motion for nonsuit made by the defendant Utah Light & Traction Company. The jury's verdict was in favor of plaintiff on each of the four causes of action. The defendant Mellen appeals.

It is not necessary to review the evidence. It is sufficient to say that plaintiff's evidence fully justified the court in submitting each cause of action to the jury, and that the evidence on the principal issues was conflicting.

Citing Styles v. Long, 67 N. J. Law, 113, 51 Atl. 710, it is urged that—

"In order to maintain an action of tort for breach of a contractual duty, the plaintiff must have the same status under the contract as would entitle him to maintain an action upon contract for a breach of its stipulations," and "where a contract is made by a public corporation for the construction of a public work, and incidentally contains stipulations intended for the safety of the public, an individual, who sustains personal injuries by reason of the nonperformance of such stipulations does not bear such a relation to the contractor as will support an action of tort against the latter, based upon a mere violation of contractual duty."

The provisions of the contract between Mellen and the state road commission are in part:

"The contractor shall erect and maintain good and sufficient guards, barricades, and signals at all unsafe places at and near the work and shall in all cases maintain a safe passageway at all road crossings, crosswalks, and street intersections, and shall do all other things necessary to prevent accident or loss of any kind. * * * The contractor shall be liable for all damage done to water or other pipes, flumes, poles, or conduits, or other property owned by any person or corporation other than Salt Lake county."

Except those of New Jersey, the courts have held that such contracts inure to the benefit of any one of the public who is injured by the neg-

ligent failure of the contractor to take those precautions which he agreed to take for the protection of the public. The contract is a measure of the contractor's duty. If he assumes a responsibility broader than that of his common-law liability for negligence, he becomes liable for torts arising out of a breach of such duty which are the proximate cause of injury to third persons.

McMahon v. Second Avenue Railroad Co., 75 N. Y. 231, was a case wherein the railroad company had contracted with New York City to pave the streets upon which its tracks rested and to keep the same in repair. A trench had been dug across the street and under defendant's tracks, and the defendant took up the pavement and laid planks over the excavation. The plaintiff was injured in driving over the planks, and the court held that the defendant was liable on two theories: (1) Because of its contract with New York City; and (2) because it had negligently maintained the structure over the trench. In the opinion the Court, inter alia, said:

"A liability may arise in two ways: First, from the defendant's having contracted with the municipality to do, instead of it, the duty which was upon it, to keep the street safe for the passage of the public; and by neglect to do that duty, having given cause of action against the municipality for neglect; then action will be directly against the defendant therefor, instead of first against the municipality, so as to avoid circuity of action (City of Brooklyn v. Brooklyn City R. R., 47 N. Y. 475) and, second, from the defendant's voluntarily interfering and undertaking to make the way safe, and so inefficiently doing it as to leave it unsafe, and, at the same time, so as to permit and tempt passage over it.

"For the purpose of showing the first named of these grounds of liability, a contract was put in evidence, between the defendant and the municipality, by which the defendant agreed to keep the streets in and about the rails in repair. * * * There was then the duty upon the defendant, to the public and to this plaintiff, to keep the street in repair, just at the place where his wheels went down, or to warn away therefrom. * * * There was no error in admitting in evidence the agreement between the defendant and the municipality. That was material and proper, to show that there was undertaken by the defendant the duty which lay primarily upon the city to give the public, and the plaintiff, as one thereof, a safe passage through the thoroughfares. The reception of the agreement in evidence did not change the cause of action from one arising in tort to one based upon contract. It showed the duty of the defendant, and made applicable the other facts of the case, to show its negligence of duty, wherein it was tortious."

The respondent cites the following cases and authorities which support the general doctrine; Cook v. Dean, 11 App. 123, 42 N. Y. Supp. 1040, affirmed in 160 N. Y. 660, 55 N. E. 1094; Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Baumgartner v. City of Mankato, 60 Minn. 244, 62 N. W. 127; Ober v. Crescent City R. Co., 44 La. Ann. 1059, 11 South. 818, 32 Am. St. Rep. 366; Casement v. Brown, 148 U. S. 623, 13 Sup. Ct. 672, 37 L. Ed. 582; St. Paul Water Co. v Ware, 16 Wall. 566, 21 L. Ed. 485; Phinney v. Boston El. Co., 201 Mass. 286, 87 N. E. 490, 131 Am. St. Rep. 400; Jenree v. Metropolitan Ry. Co., 86 Kan. 479, 121 Pac. 510, 39 L. R. A. (N. S.) 1112, Ann. Cas. 1913C, 214; Wade v. Gray, 104 Miss. 51, 61 South. 168, 43 L. R. A. (N. S.) 1046; Sullivan v. Staten Island El. Ry. Co., 50 App. Div. 558, 64 N. Y. Supp. 91. See also Alameda County v. Tieslau (Cal. App.) 186 Pac. 398, notes 39 L. R. A. (N. S.) 1112, 49 L. R. A. (N. S.) 1167, Ann. Cas. 1913C, 214.

In the light of the above authorities, and upon principle, we conclude that a case was stated and proved against appellant, based upon his common-law liability for negligence, and also upon the tort arising from the breach of the contract, in which he assumed duties and obligations that he has no right to repudiate when his negligent failure to comply with and observe them has resulted in injury and damage to the property of respondent and that of his assignors.

The judgment is affirmed, with costs.

CORFMAN, C. J., and GIDEON and THURMAN, JJ., concur.

FRICK, J., specially concurs.

NOTE—*Liability to Third Person of Contractor Agreeing to Indemnify City for Injury.*—The array of cases cited by the instant case may be conceded, but this may not prevent a careful looking into the purpose of a contract to prevent damage to third persons. Thus it was held in St. Paul Water Co. v. Ware, 16 Wall. 506, 21 L. Ed. 485, that where a water company agreed with a city to protect all persons against damages by reason of excavation, the company could be held liable to one who was injured by his horse being frightened by a sub-contractor starting an engine without warning. But in Taylor v. Dunn, 80 Tex. 652, 16 S. W. 732, it was said in speaking of the above case that: "With the highest respect for the opinions of that court, always distinguished for ability and learning of its judges, it seems to us that the true construction of such a contract made with a municipal corporation would require a holding * * * that it was a contract for the indemnification of the city, and not intended by the parties to it as a contract for the benefit of individuals, in which a person injured by the negligence of a contractor or his employes, might maintain an action."

In Corrigan Transit Co. v. Sanitary District, 137 Fed. 851, 70 C. C. A. 381, there was a permit

by the Secretary of War to the District to change the current of the Chicago River. A clause provided for the district assuming all responsibility for damages to property and navigation. It was ruled that an indemnifying contract between the district and the contractor was not an undertaking to pay outsiders' damages from the perils of navigation.

And so in Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304, if a sub-contractor of one agreed to be answerable for all damages occasioned by construction of a sewer, this did not render him liable for damages by a sub-contractor, where the latter was an independent contractor, and the principal contractor interfered in no way with the doing of the work. But this decision was later criticised in Storrs v. Utica, 17 N. Y. 104, 72 Am. Dec. 437, the latter court saying in effect that where superior contractor determines the excavation shall be made, he cannot escape responsibility where by his direction the place is to be made dangerous. In Deming v. Terminal R. Co., 169 N. Y. 1, 61 N. E. 983, 88 Am. St. R. 521, overruled the Storrs case.

In Knapp v. Swaney, 56 Mich. 545, 23 N. W. 162, 56 Am. Rep. 397, it was thought it would be strange if public authority could not stipulate for the safety of all citizens.

It is familiar that material men may maintain actions on bonds demanded in public works contracts. See Young v. Young, 21 Ind. App. 509, 52 N. E. 776; Spokane & I. Lumber Co. v. Boyd, 28 Wash. 90, 68 Pac. 337; Morton v. Power, 33 Minn. 521, 24 N. W. 194.

But it has been denied that a city may by ordinance empower its director of public works to retain money owing by it to one of its contractors for the purpose of satisfying his creditors. Lesley v. Kite, 192 Pa. 268, 43 Atl. 959. But this case was held to have a limited application so as not to bring about a tying up of funds needed by the contractor for the prosecution of his work. Philadelphia v. Stewart, 195 Pa. 309, 45 Atl. 1056.

In St. Paul Water Co. v. Ware, *supra*, the court said it would not go into any question of independent contractors, because contractors had agreed to pay damages. And this it seems to us is proper and the principle may embrace all subsidiary arrangements and conditions. C.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE MAINE BAR ASSOCIATION.

Editor, Central Law Journal:

The Maine State Bar Association will hold its next meeting in August on Wednesday, January 12, 1921.

The year 1920 is Maine's Centennial Year and the session of the Bar Association will make this meeting a celebration of the century in Maine's jurisprudence.

A morning session will be held in the Supreme Judicial Court Room, in Augusta, at which will be addresses by Hon. Cyrus N. Blanchard, President of the Association, and Hon. John F. Sprague, of the Piscataquis Bar and editor of the "Sprague's Journal of Maine History" will deliver an address on "A Century of the Bar in Maine."

The afternoon session will be held in the House of Representatives in the State House at Augusta. Judge Clarence Hale, of the United States District Court, will give an address on "A Century of the Federal Courts in Maine" and Chief Justice Cornish, of the Supreme Judicial Court, will deliver an address on "A Century of the Supreme Court of Maine."

It is expected that one of the Justices of the Massachusetts Supreme Judicial Court will bring the greetings of the Mother State of Massachusetts.

There will be a banquet at the Augusta House in the evening.

Very truly yours,

NORMAN L. BASSETT.

Augusta, Me.

HUMOR OF THE LAW.

Lawyer: "Did you ever meet a fellow down there with one leg named Sanders?"

Witness (pondering): "What was the name of the other leg?"—*Detroit News.*

Vice-President Marshall, when still a struggling lawyer in Indiana, was sitting in his little office when a genial book agent entered and undertook to sell him a new edition of the Bible, "full morocco, annotated," etc.

Before the agent was through with his description of the merits of the new volume, Marshall interrupted him to ask who the author was.

"Why, this is the Bible," explained the agent.

"I am fully aware of that," answered Marshall in full soberness. "But I ask again, who is the author?"

Again the salesman explained that he was offering the Bible. And again Marshall demanded the name of the author, and then again.

Finally the man of the books gathered up his samples, retreated to the door, and then with one hand on the knob, turned around and shouted:

"You pinheaded fool and blithering idiot, it's the Bible."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Action**—Conversion Into Equity.—In an attachment suit based on a note and an account due by defendant, defendant's petition for an accounting between himself and plaintiff as to their former partnership business was in equity, so that the consolidation of the attachment proceeding, the subject-matter of which was involved in the equitable proceeding, for accounting made the consolidated case one in equity.—Moreland v. Lawson, Ga., 104 S. E. 202.

2. **Assignments**—Action for Tort.—A claim for injuries to the person is merely a personal right, and until reduced to judgment is not assignable, but a claim for damages for injury to property is assignable, and the assignee may sue thereon, under Rev. St. c. 87, § 152.—Metropolitan Ins. Co. v. Day, Me., 111 Atl. 429.

3. **Assignments for Benefit of Creditors**—Collateral Attack.—Where the court had jurisdiction of the parties and of the subject-matter, its order ratifying a sale of the property assigned for benefit of creditors cannot be attacked collaterally, though the court may have committed great irregularities and errors.—Evansville Improvement Co. v. Gardner, Ind., 128 N. E. 471.

4. **Attorney and Client**—Dismissal by Latter.—In the absence of stipulation in an attorney's contract of employment, against compromise, release, discontinuance, or other disposition of the suit without his consent, his client was at liberty in his own person to discontinue it.—Succession of Rece, La., 86 So. 283.

5.——Lien.—Under Gen. St. 1913, § 4955, as amended by Laws 1917, c. 98, an attorney has a lien for his compensation upon the cause of action of his client arising under the federal Employers' Liability Act, and in enforcing it in the original action, when his client and the defendant have settled without his consent, he proceeds as one subrogated to the original cause of action so far as necessary to protect his rights.—Miner v. Chicago B. & Q. Ry. Co., Minn., 179 N. W. 483.

6. **Bankruptcy**—Computation of Time.—Where acts of bankruptcy are sufficiently alleged for the first time in an amended petition, the four-months period within which such acts must have been committed must be computed from the filing of the amended, and not the original petition.—In re Triangle S. S. Co., U. S. D. C. 267 Fed. 303.

7.——Discharge.—A discharge in bankruptcy relieves the bankrupt from legal obligation to pay a balance due on his notes proved against his estate in the bankruptcy proceedings.—Dundee Nat. Bank v. Strowbridge, N. Y., 184 N. Y. Sup. 257.

8. **Bills and Notes**—Parol Evidence.—A promise, made by an obligee to induce the indorsement of a note that he would secure other indorsers for the note, does not change or vary the obligation of the parties on the note, and it may be proved by parol, and damages for breach thereof recovered by an indorser who was compelled to perform his obligations under the note.—Tross v. Bill's Ex'x, Ky., 224 S. W. 660.

9. **Brokers**—Burden of Proof.—To entitle a real estate broker to commissions on the sale of real estate, it is incumbent on him to show he procured the purchaser as such, and was the efficient producing cause of the sale.—Burnett v. Stick, Iowa, 179 N. W. 437.

10.——Cash Sale.—Where broker's contract is silent as to terms of payment, the broker's authority is impliedly limited to making a cash sale.—Swack v. Conway, Iowa, 179, N. W. 434.

11. **Cancellation of Instruments**—Purchase Money.—Where the trial court found the value of plaintiff's land, traded for defendants', was $3,000 less than plaintiff represented it to be, so that defendants were damaged $3,000 as alleged in the cross-complaint, such sum being in excess of the unpaid purchase money due from defendants, the trial court properly decreed cancellation of the mortgages given by them to secure such unpaid purchase money; there being no debt to secure.—Horsnell v. Gilliland, Ark., 224 S. W. 722.

12. **Carriers of Goods**—Common Carrier.—A fuel company which let its trucks with drivers to carry goods, which was part of its regular business, was a common carrier.—City Fuel Co. v. Torreyson, Ark., 224 S. W. 727.

13.——Diverting Route.—The owner of goods in transit having the right to take actual possession of them at any intermediate point on the route may divert them at any such point while in transit, and it is the duty of the car-

rier to deliver them to him or divert them according to his orders on presenting evidence of ownership and paying the proper charges.—Liberty Nat. Bank v. Hines, Director General of Railroads, S. C., 104 S. E. 313.

14.——Wrongful Delivery.—A carrier wrongfully delivered goods shipped under an order bill of lading without requiring its surrender as against a bank which held the bill of lading attached to a draft purchased by it, though merely as collateral for payment of the draft.—National Bank of the Republic v. Hines, Wash., 192 Pac. 899.

15. **Contracts**—Illegality.—An agreement for plaintiff to procure purchasers and contracts for horses at prices acceptable to defendants for a commission of $5 per head held not illegal as a contract to exert personal influence with agents of foreign governments.—Smyth Bros.-McCleary-McClellan Co. v. Beresford, Va., 104 S. E. 371.

16.—Illegality.—Where it appears that the contract sued on is illegal, the court sua sponte will withhold all relief, though the illegality is not presented by the issues.—Pacific Wharf & Storage Co. v. Standard American Dredging Co., Cal., 192 Pac. 847.

17.——Meeting of Minds.—Before a binding contract is consummated, each party must agree to the same proposition, and the agreement must be mutual as to every essential term.—Southern Cotton Oil Co. v. Frauenthal, Ark., 224 S. W. 730.

18.——Mutuality.—A city contract, which provided that, if the city for any reason failed to sell bonds due to be sold on a certain date, it might terminate the contract was voidable at the option of the city, since it required no steps for the sale of the bonds, and the contract was therefore unenforceable against the surety of the contractor for want of mutuality.—City of Pocatello v. Fidelity & Deposit Co. of Maryland, U. S. C. C. A., 267 Fed. 181.

19.——Suspension of Right.—While a subsequent statute or executive order rendering performance of a contract impossible excuses the parties from further proceedings thereunder, a mere temporary suspension of a right or duty under the contract discharges or excuses performance only if the suspension is so material or substantial that the party obligated ought of right to be held discharged.—Schoelkopf v. Moerlbach Brewing Co., N. Y., 184 N. Y. Sup. 267.

20. **Corporations**—Sole Stockholder.—Courts of equity recognize the sole stockholder of a corporation as distinct from the corporation, and do not hold the stockholder bound by the contracts of the corporation.—City of Winfield v. Wichita Natural Gas Co., U. S. C. C. A., 267 Fed. 47.

21. **Criminal Law**—Accused as Witness.—In a prosecution for robbery, where the defendant took the stand in his own behalf, it was proper to instruct that "the jury have a right to take into consideration the fact that he is interested in the result of the prosecution."—People v. Maciejewski, Ill., 128 N. E. 489.

22.——Alibi.—To maintain his defense of alibi, the burden is on defendant to establish it by such facts and circumstances as will with all the other evidence create in the minds of the jury a reasonable doubt of his guilt.—Norris v. State, Ark., 224 S. W. 724.

23.——Conspiracy.—A conspiracy to murder must be proved aliunde, and the court should have instructed that the acts and conduct of defendant's son on the night of the murder could not be used as evidence of conspiracy between them, since such acts, if a conspiracy existed, were those of a co-conspirator, and would not be evidence of a conspiracy.—Anderson v. State, Tex., 224 S. W. 782.

24. **Damages**—Intervening Cause.—If injured person in good faith and in exercise of reasonable care employs a physician to treat injuries and injury is aggravated through the mistake or negligence of physician, the injured person may recover for the injury including the aggravation thereto resulting from the mistaken or improper treatment; such negligent treatment not constituting an intervening cause.—Yarbrough v. Hines, Wash., 192 Pac. 886.

25. **Dedication**—Fee Reserved.—Where there is a dedication to the public use, the fee of the real estate dedicated remains in the dedicator.—Clark v. City of Huntington, Ind., 128 N. E. 453.

26. **Deeds**—Special Finding.—In action to cancel deed on ground of fraud, court should submit special issue as to what was the fair and reasonable market value of the land conveyed and other land conveyed in exchange therefor.—Baugh v. Baugh, Tex., 224 S. W. 796.

27. **Divorce**—Judgment.—In a proceeding to have a decree of divorce nullified in so far as it related to alimony, brought after the expiration of the term at which the divorce was granted, the court cannot, of its own motion, set aside the decree of divorce, even though the evidence in that proceeding shows that the decree was obtained by collusion, specially where both parties had remarried and had children since the divorce decree was rendered.—Delbridge v. Delbridge, Iowa, 179 N. W. 438.

28.——Remarriage.—As a general rule, statutes of a state prohibiting remarriage within a stated time after divorce and making such marriage void have no extraterritorial force, and do not invalidate a marriage within the limited time in another state, whose laws do not prohibit such remarriage.—Vickers v. Faubion, Tex., 224 S. W. 803.

29. **Easements**—Permissive Use.—The use of a passway, begun with permission of the owner of the land, cannot ripen into title to the passway, no matter how long continued, until after a claim of right to the passway, openly made by the user, has been brought to the notice of the owner of the land.—Smith v. Oliver, Ky., 224 S. W. 683.

30. **Eminent Domain**—Tort.—No taking of property without just compensation is involved in a holding that an action for death cannot be maintained against a county highway commission; the action being against a governmental agency for tort.—Mullinax v. Hambright, S. C., 104 S. E. 309.

31. **Equity**—Complete Relief.—Wherever a court of law may take cognizance of a right, and has power to proceed to a judgment affording a plain adequate remedy, the constitutional right of a trial by jury may not be abridged by resort to a court of equity, and a bill seeking only a decree for the payment of money will not lie.—Grant v. Giuffrida, D. C., 267 Fed. 331.

32. **Estoppel**—Inconsistent Pleading.—In an administrator's action against a mortgagee and his attorney for interpleader alleging the administrator's authorized sale of mortgaged land and his deposit of the proceeds in the court, the mortgagee, by accepting under order of the court so much of the fund as his attorney did not claim to be subject to his alleged lien, by subsequently demurring to the petition at the appearance term did not assume a position inconsistent with that formerly taken.—Cox v. Fort, Ga., 104 S. E. 419.

33.——Inducement to Act.—To establish an estoppel the party asserting it must be induced to act through such conduct of the other party as to make it unconscionable for the latter party to repudiate his position.—Empire Voting Mach. Co. v. City of Chicago, U. S. C. C. A., 267 Fed. 162.

34. **False Imprisonment**—Aiding and Abetting.—All who take part in or assist or abet in the commission of false imprisonment are joint tort-feasors without allegation or proof of conspiracy.—Culver v. Burnside, S. D., 179 N. W. 490.

35. **Fraudulent Conveyances**—Intent.—In the very nature of the case, fraudulent intent must

usually be shown by circumstantial evidence, and circumstances altogether inconclusive, if separately considered, may, by their number and joint consideration, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.—Florida Nat. Bank v. Sherouse, Fla., 86 So. 279.

36. **Habeas Corpus**—Extradition.—Extradition papers prove prima facie that accused was in the state where the crime was committed at the time that it was charged to have been committed, and the burden is on him to establish the contrary.—Levy v. Splain, D. C., 266 Fed. 333.

37. **Husband and Wife**—Chose in Action.—Under the common law, a husband did not have a vested right in a chose in action of the wife until he had reduced it to his possession and dominion, but, where it was not the separate estate of the wife, he had the right to reduce it to possession at any time during coverture.—Conn v. White, Ky., 224 S. W. 772.

38. **Insurance**—Garage.—A lean-to connected with a barn in which an insured automobile was generally kept with a carriage is a private garage within the meaning of the application for the insurance policy, since "garage" is a place where a motor vehicle is housed and cared for, and the fact that it was connected with another building, and was not constructed for the storage of an automobile does not destroy its character as a garage.—White v. Home Mut. Ins. Ass'n of Iowa, Iowa, 179 N. W. 315.

39.——Liability Insurance.—Defendant liability insurer was under duty to plaintiff railroad company to defend an action for personal injuries against the railroad with a single eye to the railroad's interests, apart from defendant insurer's thought of liability on its policy issued to plaintiff railroad's contractor, a codefendant to the action.—New York Consolidated R. Co. v. Massachusetts Bonding & Ins. Co., N. Y., 184 N. Y. Sup. 243.

40.——Total Disability.—Absolute physical inability to transact any kind of business pertaining to insured's occupation is not meant by the term "total disability," or its equivalents, in an accident policy.—Clarke v. Travelers' Ins. Co., Vt., 111 Atl. 449.

41.——Waiver.—When a fire insurance company denies liability under its policy it waives its right to proof of loss as required by its policy.—Ward v. Pacific Fire Ins. Co., S. C., 104 S. E. 316.

42. **Judgment**—Vacation.—Judgments may be vacated, where they are tainted with and are the creatures of extrinsic fraud.—Cobb v. Cobb, S. D., 179 N. W. 498.

43. **Landlord and Tenant**—Breach.—Where lessee's performance of his contract was prevented by breach of lessor's agreements, lessor can, after rescinding the contract, recover his expenditures in preparation for performance thereof by an action for breach of contract.—Columbia Agricultural Co. v. Seid Pak Sing, U. S. C. C. A., 267 Fed. 1.

44.——Repairs.—The landlord generally is under no implied obligation to repair the leased premises in the absence of such a contract, and is not responsible to a tenant for injury to persons or property caused by defects, where there has been no reservation by him of any portion of the leased premises.—Home Realty Co. v. Carius, Ky., 224 S. W. 751.

45. **Libel and Slander**—Qualified Privilege.—Qualified privilege extends to all communications made bona fide on any subject-matter in which the party communicating has an interest or in reference to which he has some moral or legal duty to perform.—Alexander v. Vann, N. C., 104 S. E. 360.

46. **Limitation of Actions**—Acknowledgment of Debt.—Where there is a distinct acknowledgment in writing of a debt as still subsisting as a personal obligation of the debtor, before it is barred by the statute of limitations, a promise to pay will be inferred.—Hall v. Brown, Fla., 86 So. 277.

47. **Life Estates**—Improvements.—A life tenant cannot recover the amount of cost of improvements, even though he comes within an exception which allows him to recover for improvements, but is limited to recovering the amount which the improvements added to the actual and permanent value of the land.—Cagle v. Schaefer, S. C., 104 S. E. 321.

48.——Power of Disposition.—On devise of a life estate, coupled with an absolute power of disposition, the devisee of the life estate, also the donee of the power, is enabled to convey the property in fee.—Tillet v. Nixon, N. C., 104 S. E. 352.

49. **Master and Servant**—Independent Contractor.—One hired at price per ton to unload coal from railroad cars by shoveling it out of the car to the bin, tools being furnished by employer, is not an "independent contractor" within the Workmen's Compensation Act.—Indiana Window Glass Co. v. Mauck, Ind., 128 N. E. 451.

50.——Negligence Per Se.—It is negligence as a matter of law for the employes of a railroad company in charge of a work train, under orders to have the train in the clear on a side track at a designated time and place where a regular scheduled passenger train was due to pass without stopping, to fail to observe such orders; and, where through such negligence an engineer on the passenger train is injured, the company is liable.—Fitzpatrick v. Hines, Director General of Railroads, Neb., 179 N. W. 410.

51.——Proximate Cause.—In an action for injuries to servant alleged to have been caused by gas which escaped from a defective stove and overcame plaintiff, after which an explosion occurred, plaintiff's failure to prove the exposion does not bar her right to recover, where other causes of injury were established.—Swan v. Dalbey, Iowa, 179 N. W. 313.

52.——Voluntary Exposure.—An injury suffered by an employe in voluntarily doing something outside of his employment, though for the benefit of his employer, is not an injury, suffered by him in the course of employment, entitling him to compensation.—Engels Copper Mining Co. v. Industrial Acc. Commission, Cal., 192 Pac. 845.

53. **Mortgages**—Redemption.—Where the original owner and mortgagor was in possession after foreclosure sale, with the right to redeem, an oral extension of the period of redemption on specified terms was taken out of the operation of the statute of frauds by the acceptance, by the purchaser at the foreclosure sale, of part of the redemption money pursuant to the agreement.—Coates v. Dortch, Ark., 224 S. W. 721.

54.——Lien.—A deed of trust, to secure the bonds of numerous creditors including plaintiff, provided that the claim of plaintiff should be a first lien, and be preferred in payment from whatever source or manner paid. On default, the trustee at the written direction of the creditors, including plaintiff, foreclosed and bid in the property for less than the amount of all claims and later sold the property for a still smaller amount. Held, plaintiff's priority of claim was impressed on the property bid in and his right of priority was not waived by his assent to a foreclosure sale for less than the amount of all claims.—Hohag v. Northland Pine Co., Minn., 179 N. W. 485.

55. **Negligence**—Contributory Negligence.—The conduct of plaintiff to determine the question of contributory negligence, is to be measured by the conduct of an ordinarily prudent person, which is peculiarly a question for the jury.—Marsters v. Isensee, Ore., 192 Pac. 907.

56. **Partnership**—Compensation.—An agent or servant, whose compensation is measured by a certain portion of the profits, is not thereby made a partner in the business, and receiving a share of profits in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect.—James Bailey Co. v. Darling, Me., 111 Atl. 410.

57. **Perjury**—Issue.—The materiality of alleged perjured testimony on the point or issue involved is a question of law in prosecution of the witness for perjury, and not one of fact.—People v. Glenn, Ill., 128 N. E. 532.

58. **Pleading**—Motion for Judgment.—A motion for judgment on the pleadings is of the

nature of a demurrer, is governed by the rules applicable to a general demurrer, and admits every material fact properly stated in the pleadings.—Nires v. Hogan, Okla., 192 Pac. 811.

59. **Principal and Agent**—Scope of Agency.—Unless expressly authorized by his principal, a traveling salesman or "drummer" has authority only to solicit orders and transmit the same to his principal for approval, and may not make an absolute contract of sale.—Cape County Savings Bank v. Gwin Lewis Grocery Co., Miss., 86 So. 275.

60. **Quieting Title**—Burden of Proof.—The plaintiff in an action to quiet title to land must allege and prove that he is the owner of either the legal title or the complete equitable title. Unless plaintiff has the title, it is immaterial to him what title defendant claims.—Clark v. Duncanson, Okla., 192 Pac. 806.

61. **Railroads**—Director General.—Under the Federal Control Acts, the President's proclamation of December 26, 1917, and the Director General's General Order No. 50 issued pursuant thereto, a passenger on a railroad operated by the Director General cannot maintain an action against the railroad company for injuries.—Mardis v. Hines, Director General of Railroads, U. S. C. C. A., 267 Fed. 171.

62. **Rape**—Corroboration of Accomplice.—In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction.—Force v. State, Neb,. 179 N. W. 387.

63. **Sales**—Executory Contract.—Where buyer agreed to pay for goods in logs cut and skidded at so much a thousand, the seller to have the right to cut sufficient timber to pay for goods on buyer's failure to so do, the contract, so far as it remained unperformed by buyer, was executory, and the seller's only remedy for a breach thereof was an action for damages.—Norton v. Green, Vt., 111 Atl. 458.

64.——F. O. B.—A provision of contracts for the sale and purchase of coke, to be delivered "f. o. b. open top cars ovens," held not to require purchaser to furnish cars at the ovens, where during the several months of performance the cars were provided by seller with no demand on the purchaser for cars, and where seller was not a producer, but bought its coke from different producers, and no notice was given purchaser from what ovens shipments were to be made.—Producers' Coke Co. v. McKeefrey Iron Co., U. S. C. C. A., 267 Fed. 22.

65.——Implied Warranty.—Upon a sale of seed wheat by a particular name, a warranty that the seed was of the kind named arises.—Johnson v. Foley Milling & Elevator Co., Minn., 179 N. W. 488.

66.——Reservation of Title.—Automobile sales contract, providing that the "car stand good for the debt," held not to have reserved title in seller, but created a lien enforceable merely between the parties.—Yale Automobile Co. v. Walker, Ark., 224 S. W. 632.

67. **Specific Performance**—Equity.—Equity has jurisdiction specifically to enforce contracts for the sale of land, though there be a remedy at law for damages.—Dobbin v. Plager, N. J., 111 Atl. 404.

68.——Judicial Discretion.—Specific performance is not a remedy which either party can demand as a matter of absolute right, and will not in any given case be granted unless strictly equitable and just. Mere inadequacy of price may justify a court in refusing to decree a specific performance of a contract of bargain and sale; so also may any other fact showing the contract to be unfair, or unjust, or against good conscience. And, in order to authorize specific performance of a contract, its terms must be clear, distinct, and definite.—Shropshire v. Rainey, Ga., 104 S. E. 414.

69.——Mutuality.—A contract for the delivery of personal property lacks mutuality, and cannot be specifically enforced, where the quantity delivered, if any, depends on the will or desire of one party, though it may be enforced if the quantity may be determined, as where it is for the delivery of all articles needed in a person's business.—Hutchinson Gas & Fuel Co. v. Wichita Natural Gas Co., U. S. C. C. A., 267 Fed. 35.

70. **Tenancy in Common**—Acquisition of Title.—While it is a general rule that one tenant in common may not, as against his cotenant, acquire sole title to the common property by purchase at a sale made to satisfy a lien existing when they became owners, the cotenant may not desire to object. He may consent that the purchaser take the full title indicated by master's or sheriff's deed, he may afterwards voluntarily relinquish his interest, and he may lose it by lack of diligence in electing to call on a court of equity to give him the benefit of the purchase.—Moon v. Moon, Kan., 192 Pac. 840.

71. **Trade Marks and Trade Names**—Abandonment.—"Abandonment" of a trade-mark is its voluntary disuse or nonuse, an intent which may be inferred from circumstances necessarily pointing to it, though mere disuse, even for a considerable period, in the absence of intentional abandonment, will not amount to an abandonment, or destroy trade-mark rights, unless the mark has ceased to be distinctive.—Corkran, Hill & Co., v. A. H. Kuhlemann Co., Md., 111 Atl. 471.

72.——Abandonment. — Abandonment of a trade-mark by the owner, which defeats his rights thereto, rests upon an intent to abandon —Ansehl v. Williams, U. S. C. C. A., 267 Fed. 9

73. **Vendor and Purchaser**—Merchantable Title.—Though a purchaser cannot be compelled to take a doubtful title he cannot object to a title on account of a bare possibility that it will prove defective.—Duncan v. Clore, Ky., 224 S W. 678.

74. **Wills** — Comparison of Handwriting.—Testimony of handwriting experts that a will offered for probate is a forgery, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of subscribing witnesses that they saw the will executed. — O'Connor v. Slaker, Neb., 179 N. W. 401.

75.——Postponed Possession.—An instrument attested by three witnesses and in all respects in the form of a deed should, though it contains the words, "This deed goes into effect at the death of me and my wife," be treated, not as a will, but as a conveyance passing title in praesenti with right of possession postponed till the death of the maker and his wife.—Crawford v. Thomas, Ga., 104 S. E. 211.

76.——Repugnancy.—A testator cannot, in subsequent clauses in a will, impose limitations upon an estate bequeathed absolutely in the first instance.—Fies v. Feist, Ark., 224 S. W. 633.

77.——Revocation.—If a testator cancels or destroys a will with the present intention of making new disposition of his property, and the proposed new disposition fails to be carried into effect, the presumption in favor of a revocation by the canceling is repelled, and the will stands as originally made.—In re Marvin's Will, Wis., 179 N. W. 508.

78.——Testamentary Capacity.—Disinheritance of children, or other persons having a strong claim on bounty, as grandchildren, is competent to show mental incapacity to execute a will, and generally to show the state of testator's mind.—In re Hinton's Will, N. C., 104 S. E. 341.

79.——Testamentary Capacity.—It is essential in the creation of testamentary trusts that the testator adequately indicate by the terms of his will his intention to create such a trust by using language sufficient to sever the legal from the equitable estate, and with certainty identify the beneficiaries and the property out of which the trust is to take effect.—Randolph v. Wilkinson, Ill., 128 N. E. 525.

80. **Witnesses** — Former Conviction. — In a prosecution for conspiracy, it was not error to permit a witness to testify for the government over the objection that he had theretofore been convicted of a felony.—Ammermann v. United States, U. S. C. C. A., 267 Fed. 136.

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